

REMARKS/ARGUMENTS

In response to the Office action dated February 18, 2010, Applicant requests the Examiner to reconsider her rejection for the reasons set forth hereinbelow.

The Examiner has rejected independent claim 44 over a combination of three newly cited references and further in view of a fourth cited reference (Abil®) which was previously cited. Applicant submits that the combination of the four references in the manner proposed by the Examiner belies the concept of a whole clause of 35 U.S.C. 103 and is motivated solely by Applicant's instant disclosure.

In reaching a conclusion of obviousness, the Examiner has set forth the following:

" 'It is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose....[T]he idea of combining them flows logically from their having been individually taught in the prior art.' *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) see MPEP 2144.06. Therefore since zinc oxide nanopigment, 3-(4-methylbenzyldiene) camphor, and isoamyl p-methoxycinnamate are all known as UV filters, it would have been obvious to one of ordinary skill at the time of the invention include all three of them as the sunscreen agents in the composition of Roulier et al. in view of Omura et al., Krzysik et al. and Katsuyama et al. as evidenced by the Abil® EM 90 reference."

By the Examiner's own standard, the rejection must fail as, by the Examiner's own standard, the compositions attempted to be combined are not useful for the same purpose and when formed do not correspond to the composition of the instant application.

With respect to independent claim 44, independent claim 44

sets forth the following:

...wherein the outer phase comprises at least one polyvalent ester....
wherein the polyvalent ester is selected from the group consisting of
(1) polyvalent, at least divalent alcohols each with at least two acid residues,
(2) polyvalent, at least divalent acids and at least two respective alcohol residues, and
(3) polyvalent alcohols and polyvalent acids,
wherein the chain length of the residues originating from the alcohol is C₂ to C₆₀ and the chain length of the residues originating from the acids is C₄ to C₆₀, wherein the ester has a melting point in the range of 40 to 200°C.

According to the Examiner's statement (starting on page 4, last line), the waxes taught by Roulier are envisioned as fatty esters that are solid at 25°C and more particularly having a melting temperature above 65°C. There is no teaching about polyvalent esters in the Roulier reference.

According to the Examiner's statement, Roulier teaches sunscreen agents in column 4, lines 17-26. Applicant cannot find the wording sunscreen in the cited chapter.

According to the Examiner's statement, Krzysik teaches a set of fatty esters with a melting point above 35°C that are suitable for use in cosmetic compositions intended to protect or repair skin as well as cosmetic applications (see Column 4, lines 5-9 and 14-17). There is no teaching "as cosmetic application" beside "cosmetic cleansing". In view of Applicant's description there is no hint for cleansing products.

According to the Examiner's statement Krzysik teaches "One of these fatty esters that also has the preferred melting point of Roulier is pentaerythritol tetrabehenate (see Column 5, lines 45-46 and 65-66, Column 6, line 16). The teaching of the cited

paragraphs is: "The composition ... include ... solidifying agents." and "Examples of suitable agents include...the following compounds:...pentaerythrityl tetrabehenate". There is no teaching about the use of fatty esters. Furthermore, there is a teaching to elect a solidifying agent from: "alkyl silicones (silicon),...polypropylene (polymer), zinc stearate (soap) and mixtures of such compounds.

Roulier is directed to a "W/O-Emulsion".

Krzsik is directed to an "Absorbent Article" according to title, abstract and claims.

Keeping in mind the definition for "obvious" as the Examiner stated, these documents are not useful for the same purpose. Thus, the combination is not obvious.

There is no teaching in Roulier to use polyvalent esters.

There is no teaching in Kryzik to use polyvalent esters for cosmetic use in general.

In light of the foregoing, it is submitted that the references attempted to be combined by the Examiner are not useful for the same purpose and therefore fail to establish a *prima facie* case of obviousness. It is submitted that the only motivation for combining the references in the manner proposed by the Examiner is Applicant's own disclosure. Such a combination of references as proposed by the Examiner belies the concept as a whole clause of 35 U.S.C. 103. The Examiner's position is untenable and should be withdrawn.

An earnest and thorough attempt has been made by the undersigned to resolve the outstanding issues in this case and place same in condition for allowance. If the Examiner has any questions or feels that a telephone or personal interview would be helpful in resolving any outstanding issues which remain in this application after consideration of this amendment, the

Examiner is courteously invited to telephone the undersigned and the same would be gratefully appreciated.

It is submitted that the claims as pending patentably define over the art relied on by the Examiner and early allowance of same is courteously solicited.

If any fees are required in connection with this case, it is respectfully requested that they be charged to Deposit Account No. 02-0184.

Respectfully submitted,

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